

HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JTH TAX LLC (d/b/a LIBERTY TAX
SERVICE),

Plaintiff,

vs.

MARK KELLY,

Defendant.

Case No. 3:20-cv-05484-RJB

**ORDER GRANTING MOTION TO
DISMISS COUNTERCLAIMS**

This matter comes before the court on Plaintiff JTH Tax LLC d/b/a Liberty Tax Service's ("Liberty") Motion to Dismiss Defendant's Counterclaims. Dkt. 30. The Court is familiar with the record related to the motion and the remaining record herein.

I. FACTS

In this case, Liberty alleges that the Defendant, Mark Kelly, a former franchisee, breached his franchise agreement with Liberty by operating a competing tax preparation business and using Liberty's federally registered trademarks, service marks, and logos after his franchised business was terminated. Dkt. 1. Liberty makes claims for violations of the Lanham Act, 15 U.S.C. §§ 1125(a) and 1125(c), the Defend Trade Secrets Act, 18 U.S.C. §1836, *et. seq.*, Washington Uniform Trade Secrets Act, RCW 19.108, *et. seq.*, breach of contract, breach of covenants not to compete or solicit, request for accounting, conversion,

1 unjust enrichment, and tortious interference with business relations. *Id.* Liberty requested
2 damages, injunctive relief, attorneys' fees and costs. *Id.*

3 In his Answer to the Complaint, Defendant Kelly asserts counterclaims for violations
4 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, violations of Washington's "franchise
5 disclosure requirements" found at RCW 19.100.080, breach of contract, breach of the implied
6 covenant of good faith and fair dealing, violations Washington's Franchise Investment Act,
7 RCW 19.100.180, and violations of Washington's Unfair Businesses Practices Act, RCW
8 19.86.020. Dkt. 24.

9 On August 19, 2020, the Court issued an order granting Liberty's Motion for a
10 Temporary Restraining Order, which, by its terms, has now been converted to a Preliminary
11 Injunction. Dkt. 33.

12 Now pending is Liberty's motion to dismiss Defendant Kelly's counterclaims. Dkt. 30.
13 Kelly's response to the Motion to Dismiss was due on August 24, 2020. Kelly filed no
14 response.
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16 II. DISCUSSION

17 Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a
18 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
19 theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material
20 allegations are taken as admitted and the complaint is construed in the plaintiff's favor.
21 *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule
22 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to
23 provide the grounds of his entitlement to relief requires more than labels and conclusions, and
24 a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v.*
25 *Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). "Factual allegations must
26 be enough to raise a right to relief above the speculative level, on the assumption that all the

1 allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555. The complaint
2 must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 547.

3 “Except for motions for summary judgment, if a party fails to file papers in opposition
4 to a motion, such failure may be considered by the court as an admission that the motion has
5 merit.” Local Rules W.D. Wash. LCR 7(b)(2). Here, the Court considers Defendant Kelly’s
6 failure to file a response as an admission that the motion to dismiss has merit.
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8 The Motion to Dismiss (Dkt. 30) should be granted. Liberty properly points out his
9 Sherman Act claims should be dismissed because Defendant Kelly has failed to allege
10 sufficient facts which would demonstrate that he has standing, has failed to adequately identify
11 a relevant market, failed to plead which two products he alleges are “tied,” allege facts to
12 support an assertion that Liberty had market power or monopoly power, or that Defendant
13 Kelly suffered a cognizable antitrust injury.
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15 Moreover, Liberty properly points out that Defendant Kelly’s franchise disclosure
16 claim is time barred. As to Defendant Kelly’s breach of contract, Liberty’s argument, that
17 Defendant Kelly fails to point to any provision of the contract Liberty is alleged to have
18 breached, has merit. In regard to Defendant Kelly’s claim for breach of the implied covenant
19 of good faith and fair dealing, Liberty’s argument the claim should be dismissed because
20 Virginia (which is the law the parties agreed would apply to this contact) does not recognize
21 such a claim, is well taken.
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23 Further, Liberty properly points out that Defendant Kelly’s claims for violations
24 Washington’s Franchise Investment Act, RCW 19.100.180 should be dismissed because he
25 failed to plead that Liberty’s purchasing requirements “substantially affect competition” as
26 required under RCW 19.100.180(b) or that the sales complained of were from Liberty during
Defendant Kelly’s time as a franchisee as required under RCW 19.100.180(d). Lastly, Liberty

1 properly points out that Defendant failed to plead that the actions by Liberty complained of
2 affected the public interest as is necessary to state a claim for violations of Washington's
3 Unfair Businesses Practices Act, RCW 19.86.020.

4 The motion should be granted and the counterclaims dismissed.

6 **III. ORDER**

7 It is **ORDERED** that:

- 8 • Plaintiff JTH Tax LLC d/b/a Liberty Tax Service's Motion to Dismiss Defendant's
9 Counterclaims (Dkt. 30) **IS GRANTED**; and
10 • Defendant's counterclaims **ARE DISMISSED**.

11 DATED this 8th day of September, 2020.

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14 ROBERT J. BRYAN
15 United States District Judge
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